No. 75-792

In the Supreme Court of the United States

OCTOBER TERM, 1975

NORTHSIDE REALTY ASSOCIATES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners, one of the largest residential real estate firms in Atlanta, Georgia, and the firm's Vice President and principal broker, seek review of a decision affirming a district court order enjoining them from further violations of the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, 82 Stat. 81 *et seq.*, 42 U.S.C. 3601 *et seq.*).

Petitioners do not challenge the findings below that they engaged in racial discrimination in housing; nor do they suggest that the injunction entered by the district court is inappropriate in light of their proven illegal conduct. Rather, petitioners' sole contention is that the Attorney General was not authorized to seek and obtain the relief granted in the absence of an independent judicial determination of the "general public importance" of the federally protected rights at issue.

1. Section 813 of the Fair Housing Act, 42 U.S.C. 3613, authorizes the Attorney General to bring suit for an injunction or other order whenever he has reasonable cause to believe that (1) any person or group of persons is engaged in a pattern or practice of resistance to the rights granted by the Act, or (2) any group of persons has been denied rights granted by the Act and such denial "raises an issue of general public importance." In July 1970, the Attorney General instituted this action against petitioners, alleging that they had refused to make housing available to black persons on account of race.

Following a trial, the district court concluded that the government had proven violations of the Act "of sufficient public importance to authorize the relief * * * granted" (Pet. App. A-8). Specifically, the court found *inter alia* that petitioner Northside, which sells thousands of homes each year, had never sold a single one to a black person (Pet. App. A-2) and that petitioner Ed Isakson had in substance admitted a racially discriminatory policy by publicly intimating to other real estate salespeople that they tell a half-truth (as he had done) to avoid dealing with a black prospect (Pet. App. A-2 to A-3).

On petitioners' first appeal, the court of appeals remanded because the district court's opinion had not stated with sufficient clarity which portion of Section 3613 it had relied upon in fixing liability, and because of the possibility that the court's decision may have been based on statements by petitioner Isakson that challenged the constitutionality of the Fair Housing Act (Pet. App. A-18 to A-22). The Fifth Circuit, however, expressly rejected petitioners' contention that the Attorney General's determination of general public importance was subject to judicial review (Pet. App. A-16):

> The question of what constitutes an issue of general public importance is, absent specific statutory standards, a question most appropriately answered by the executive branch. [Citations omitted.] Just as in his determination whether to prosecute a criminal case, the Attorney General must have wide discretion to determine whether an issue of public importance is raised.

On remand, the district court (1) found that the government "was entitled to relief without regard to [petitioner's] statement about constitutionality" (Pet. App. A-29), (2) essentially reiterated its initial findings of violations of the Act, and (3) again concluded, despite the court of appeals' holding that such an inquiry was for the Attorney General alone, that the "denial of protection is of sufficient public importance to authorize the relief * * * granted" (Pet. App. A-37).[1]

Petitioners appealed once more and the court of appeals affirmed *per curiam*, declining a suggestion to remand the case to the Attorney General for a redetermination whether the facts warranted bringing of the lawsuit (Pet. App. A-41 to A-42). On September 4, 1975, the court of appeals denied a petition for rehearing, adhering to its two earlier opinions and noting again that the district court "had ample basis for concluding that Northside Realty * * * has violated the Fair Housing Act so as to require enjoining Northside from further violations of the Act" (Pet. App. A-45, A-53).

2. The decision of the court of appeals that, at least in the absence of specific statutory standards, it is for the executive and not the judiciary to determine whether a fact situation raises an issue of "general public importance" is

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[1]The district court's injunction is reprinted at Pet. App. A-37 to A-40.

correct and warrants no further review. As the Fifth Circuit noted (Pet. App. A-54), ascertaining "what constitutes an issue of general public importance is hardly susceptible of 'proof' in the normal legal sense at all." Moreover, the court's holding is consistent with a variety of decisions in this and related areas that have left the determination to the Attorney General. See, *e.g.*, *United States* v. *Bob Lawrence Realty, Inc.*, 474 F.2d 115 (C.A. 5), certiorari denied, 414 U.S. 826 (housing); *United States* v. *Greenwood Municipal Separate School District*, 406 F.2d 1086 (C.A. 5), certiorari denied, 395 U.S. 907 (school desegregation); *United States* v. *Gustin-Bacon*, 426 F.2d 539 (C.A. 10) (employment). See also *Cornelius* v. *City of Parma*, 374 F. Supp. 730, 744, n. 18 (N.D. Ohio), and cases cited at Pet. App. A-54 to A-55, n. 11. Contrary to petitioners' assertions (Pet. 14), this interpretation of Section 3613 does not grant the Attorney General unbridled power to obtain an injunction. In a suit brought by the government, a violation of the Fair Housing Act must still be proven and the other requisites of equitable relief satisfied.

In any event, petitioners do not suggest that this litigation lacks "general public importance" and, as noted above, the district court expressly concluded that the "denial of protection is of sufficient public importance to authorize the relief herein granted" (Pet. App. A-37). This finding is certainly appropriate in light of the size of petitioner's real estate firm and the individual petitioner's effective admission of a racially discriminatory policy and implicit attempt to encourage resistance to the Act.

3. Nor is review by this Court necessary to resolve the alleged conflict (Pet. 9-12) between the approach taken by the court below and that in *United States* v. *Hunter*, 459 F. 2d 205 (C.A. 4), certiorari denied, 409 U.S. 934. Although language of the Fourth Circuit in *Hunter* suggests that a district court must find the case to be of "general public importance" before relief under the second alternative of Section 3613 may be granted, the court of appeals affirmed the denial of injunctive relief in that case not because the issue presented was unimportant (the court explicitly found to the contrary, 459 F.2d at 218), but because declaratory relief had been granted and the violation was unlikely to recur. 459 F.2d at 220. Indeed, since the Fourth Circuit essentially held that an issue of "general public importance" will exist whenever the Attorney General proves that a group of persons has been denied benefits of the Act, any difference between the circuits is in language, not result. As the court below noted (Pet. App. A-48 to A-49):

> Moreover, *Hunter* is of little help to appellant's argument. In that case, the Fourth Circuit held two isolated, allegedly discriminatory acts insufficient to establish a pattern or practice of resistance. 459 F.2d at 217. Nonetheless, the *Hunter* Court held that, under the same facts, the Government "clearly" had established its right to bring the case as raising an issue of general public importance. 459 F.2d at 217-218. *Hunter* thus is of little solace to a party arguing that even though a violation of the Fair Housing Act has been established, the issue is still not one the Attorney General might deem to be of public importance.

The absence of conflict between the two courts of appeals is further demonstrated by the fact that subsequent district court decisions in the Fourth Circuit have continued to hold that the question whether a case is of "general public importance" is for the executive branch to decide. See, *e.g.*, *United States* v. *Hughes Memorial Home*, 396 F. Supp. 544, 551-552 and n. 7 (W.D. Va.); *United States* v. *Long*, D. S.C., No. 71-1262 (January 14, 1974), modified as to relief, C.A. 4, No. 74-1398 (October 28, 1975).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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